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Supreme Court, U.S.
FILED
JUN 15 1992
OFFICE OF THE CLERK

No. 91-1778

In The

Supreme Court of the United States

October Term, 1991

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION,

Petitioner,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BEN DAVIDIAN
Chairman
SCOTT HALLABRIN
DEANNE STONE
Staff Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, California 94814
Telephone: (916) 322-5901

Of Counsel

DANIEL E. LUNGREN
Attorney General of the State of California
CATHY CHRISTIAN
Supervising Deputy Attorney General
MANUEL M. MEDEIROS*
Deputy Attorney General
P. O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 323-1996

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I.

RESPONDENTS MISCHARACTERIZE PETITIONER'S CONTENTION RESPECTING THE TEST EMPLOYED BY THE LOWER COURTS

Respondent Service Employees International Union (hereinafter, SEIU)[1] suggests that Petitioner would have required the lower courts to find an *illicit motive* on the part of the voters of California in enacting Proposition 73. This is not the case.

The district court ruled, and the circuit court agreed, that Proposition 73's fiscal-year limitation on campaign contributions infringed on First Amendment political rights *because* the statute's fiscal-year accounting basis "tends to discriminate against challengers by exacerbating the discrimination inherent in the limits themselves." (FPPC Pet. at A-9; A-114, Finding 155.) However, even SEIU did not contend that Proposition 73 discriminates against challengers *on its face*; rather SEIU contended that Proposition 73 *would have the effect* of discriminating against challengers because of anticipated campaign contribution patterns.

This Court has held, in connection with campaign contribution laws, that, "[a]bsent record evidence of *invidious* discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions."

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[1] For the sake of brevity, Petitioner's reference to respondent Service Employees International Union is intended to encompass all of the plaintiffs in the district court proceedings below (*See FPPC Pet. at ii*) who have joined SEIU in opposing certiorari.

(*Buckley v. Valeo*, 424 U.S. 1, 31 (1976) (emphasis added).) Nowhere in the instant case did the lower courts indicate how the fiscal-year accounting basis of Proposition 73 *invidiously* discriminated against challengers; nor has SEIU illuminated this point in its opposition to certiorari.

Not every intentional discrimination is "invidious" for purposes of the Fourteenth Amendment. (*American Party of Texas v. White*, 415 U.S. 767, 781 (1974).) As SEIU points out, the "[t]erm 'invidious' in context of claim that difference in treatment amounts to 'invidious' discrimination in violation of the Fourteenth Amendment, means arbitrary, irrational and not reasonably related to a legitimate purpose." (SEIU Br. at 5 n. 3, quoting from *Black's Law Dictionary*, p. 826 (6th ed. 1990).)

But, in all events, invidious discrimination must necessarily be purposeful, i.e., there must be both a discriminatory intent and a discriminatory effect. (*City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980); *Davis v. Bandemer*, 478 U.S. 109, 127 (1986).)[2] Unintended, incidental differences in the *effect* of the statute are not, by definition, "invidious." Thus, where, as here, the challenged statute is facially neutral, there must be some showing of a purposefully discriminatory *application* of the statute; a showing of mere "adverse impact" is not enough to make

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[2] Invidious discrimination need not be motivated by an *illicit* purpose, if it is *at least* purposeful and results in discrimination on a suspect basis. (*see e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 778 n. 1 (9th Cir. 1990) (Kozinski, C.J. concurring and dissenting).)

out a *constitutional* violation. (*Washington v. Davis*, 426 U.S. 229, 242 (1976).)[3]

Petitioner contends that where First Amendment political rights are alleged to be implicated *because* of asserted discrimination between candidates or voters – the so-called "hybrid" First Amendment situation (see FPPC Pet. at A-44) – the First Amendment is not violated unless the underlying discrimination is intentional. (See, *City of Mobile v. Bolden, supra*, 446 U.S. at 66-67 ["only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."].) Where, as here, the statute, *at best*, can only be characterized as having a "tend[ency] to discriminate" against a class of candidates (FPPC Pet. at A-114, Finding 155) - not because of discrimination appearing on the face of the statute, but by virtue of an anticipated pattern of

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[3] In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), a case relied on by SEIU (see SEIU Br. at 6), the Court considered a first amendment challenge to a statute that was discriminatory *on its face*, i.e., the statute was purposefully and patently discriminatory. (*Id.* at 224, see also, *Minneapolis Star v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) and cases previously cited by Petitioner, FPPC Pet. at 10 n.3.) The same was true in *Anderson v. Celebrezze*, 460 U.S. 780, 789-790 (1983), also relied on by SEIU. (SEIU Br. at 7.) The question in each of those cases, then, was whether such purposeful discrimination was unconstitutional.

SEIU's reliance on *Norman v. Reed*, 112 S.Ct. 698 (1992) and *Lubin v. Panish*, 415 U.S. 709 (1974) (see SEIU Br. at 7) is misplaced. Those cases did not concern alleged "indirect" infringement with First Amendment rights *resulting from discrimination between classes* of persons – the so-called "hybrid First Amendment/Equal Protection question." (FPPC Pet. at A-144.)

contributions by voters – such unintended "adverse impact" is not unconstitutional (*Washington v. Davis, supra*, 426 U.S. at 242) and, perforce, there is no "derivative" violation of the First Amendment.

Accordingly, the petition should be granted, and the Circuit Court's decision should summarily be reversed. The lower courts improperly invalidated Proposition 73 solely because the statute might have a "tendency" to have an "adverse impact" on challengers. There was no evidence whatsoever of any intent to discriminate against challengers on the part of the voters of California, and it is undisputed that the statute does not, on its face, discriminate against challengers. Petitioner respectfully submits that, *as a matter of law*, under such circumstances, there is no violation of the Fourteenth Amendment's Equal Protection Clause and, therefore, there can be no "derivative" violation of the First Amendment political rights of candidates.

II.

RESPONDENTS' ASSERTION THAT PETITIONER SHOULD BE REQUIRED TO MOVE THE DISTRICT COURT FOR RECONSIDERATION IN VIEW OF THE ADOPTION OF PROPOSITION 140 IGNORES THE FUNDAMENTAL QUESTION OF ARTICLE III JURISDICTION

SEIU does not flatly deny petitioner's assertion that, following adoption of Proposition 140, "the political landscape of California changed dramatically, and the relationship between fundraising and challenges to an incumbent officeholder immediately became a matter of

pure conjecture." (FPPC Pet. at 14.) But SEIU does *speculate* about the impact of Proposition 140 on campaign financing: "In many cases, Proposition 73 would work the same discrimination against challengers because it would still permit incumbents to raise sufficient money to finance their campaigns by denying challengers an equal opportunity to reach the threshold they need." (SEIU Br. at 15.)

This is, of course, *pure conjecture.* As Petitioner pointed out (FPPC Pet. at 15-19), and as SEIU cannot reasonably deny, it remains to be seen whether the far more marginal advantages that incumbents now have after Proposition 140 will render Proposition 73's alleged "tend[ency] to discriminate" even more attenuated.

The enactment of Proposition 140, and this Court's denial of certiorari from the judicial challenge thereto (*Legislature v. Eu,* 54 Cal.3d 492 (1991), *cert. denied* 112 S.Ct. 1292 (1992)), necessarily raised the question whether there still existed a case or controversy within the meaning of Article III of the Constitution. Plaintiffs had alleged an unconstitutional "adverse impact" based *entirely* on prediction from data concerning election campaigns that were conducted in a dramatically different political context. Whatever predictive value plaintiffs' data may have had *prior* to enactment of Proposition 140, there can be no reasonable dispute that the data's predictive value is virtually nil *after* enactment of Proposition 140.

Significantly, SEIU does not deny that the adoption of Proposition 140 may justify dissolution of the district court injunction. However, SEIU argues that *Petitioner* should be required to prove that, following Proposition

140, the fiscal-year basis for campaign contributions no longer "tends to discriminate" against challengers. (SEIU Br. at 16.) SEIU misses the point.

Plaintiffs challenged Proposition 73 on a theory of "adverse impact," a theory which necessarily required plaintiffs to demonstrate an *actual* adverse impact. It is questionable that Plaintiffs' case presented a ripe controversy when it was filed, because of the absence of any campaign experience whatsoever under the contribution limits of Proposition 73. However, the Ninth Circuit was satisfied with the trial court's reliance on data concerning previous campaigns because of the presumed similarity of the circumstances under which future election campaigns would be conducted. (FPPC Pet. at A-13; emphasis added.)

Whether or not Article III jurisdiction was satisfied because proof of the alleged injury could be projected from prior data *collected under similar circumstances* – an issue which Petitioner does not concede – it is clear beyond question that, after adoption of Proposition 140, the political circumstances informing campaigning would likely be *quite dissimilar* (*see* FPPC Pet. at 15-19), and Plaintiffs' complaint of adverse impact was, therefore, and necessarily, *speculative and premature.*

"It is not enough that the initial requirements of standing and ripeness have been satisfied; the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition." (13A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 2d*, § 3533, p. 211; *Steffel v. Thompson,*

415 U.S. 452, 459 n. 10 (1974).) Even assuming that Plaintiffs' action was ripe prior to adoption of Proposition 140, that action clearly was no longer ripe once Proposition 140 became the law.

At a minimum, therefore, the Court should summarily reverse the decision of the Ninth Circuit with directions to remand the case to the district court for the purpose of consideration whether Plaintiffs' action is premature in light of the intervening adoption of Proposition 140.

CONCLUSION

For the reasons stated herein and in the Petition for Certiorari, the Court should grant the petition and summarily reverse the decision of the Ninth Circuit Court of Appeals. The Court should base such reversal on the ground that Plaintiffs failed to prove intentional discrimination and, therefore, failed to prove a violation of the Equal Protection Clause of the Fourteenth Amendment. Alternatively, the Court should base its summary reversal on the ground that the district court must reconsider

whether, in light of the intervening adoption of Proposition 140, there remains a case or controversy within the meaning of Article III.

DATED: June 15, 1992

Respectfully submitted,

BEN DAVIDIAN
Chairman
SCOTT HALLABRIN
DEANNE STONE
Staff Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, California 94814
Telephone: (916) 322-5901

Of Counsel

DANIEL E. LUNGREN
Attorney General of the State of California
CATHY CHRISTIAN
Supervising Deputy Attorney General
MANUEL M. MEDEIROS*
Deputy Attorney General
P. O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 323-1996

Attorneys for Petitioner

*Counsel of Record